BODCO Engineering and Construction Sdn Bhd v Christopher ak Matthew Mattius & Anor and other applications

HIGH COURT (SIBU) — APPLICATION FOR JUDICIAL REVIEW NOS SBW-13–1/2 OF 2014, SBW-13–2/2 OF 2014, SBW-13–3/2 OF 2014 AND SBW-13–4/2 OF 2014
LEE HENG CHEONG J
5 NOVEMBER 2014

Contract — Sale and purchase of property — Liquidated damages — Developer issued notice to buyer under sale and purchase agreement ('SPA') to take vacant possession of property after architect issued certificate of practical completion ('CPC') of building — Certificate of fitness for occupation of building issued by local authority only 2 1/2 years thereafter — Buyer sued developer for payment of agreed liquidated damages ('LAD') for delay in handing over of vacant possession — Tribunal for Housing Purchaser Claims however computed LAD until date occupation permit issued by local authority and not until date of handing over of vacant possession — Whether Tribunal erred in deciding matter on ground not pleaded or advanced by buyer — Whether 'completion date of building' was date architect issued CPC and not date of occupation permit even though such was stated in one isolated clause in SPA — Whether SPA only obliged developer to deliver vacant possession and not to give 'right of occupation' to buyer within 24 months

The first respondent ('Christopher') entered into a sale and purchase agreement ('SPA') with the applicant ('BODCO') to buy a building constructed by the latter. Under cl 17(1) of the SPA, BODCO contracted to deliver vacant possession of the property to Christopher within 24 months of the date of the SPA failing which, under cl 17(2), it agreed to pay Christopher pre-estimated liquidated damages ('LAD') computed until the date of completion of the building. Clause 19(1) of the SPA provided for BODCO's architect to certify when the construction of the building was duly completed. Clause 19(2) allowed BODCO to issue a notice to the buyer to take vacant possession of the building and provided that the buyer shall be deemed to have taken vacant possession 14 days after the issue of that notice. A problematic clause in the SPA was cl 17(3) which stated that the building was deemed to be completed when the certificate stipulated in cl 20 was issued. This certificate referred to the certificate of fitness for occupation issued by the local authority, in this case, the Sibu Municipal Council ('SMC'). Going by the 24-month time-frame stipulated in cl 17(1) of the SPA, vacant possession of the building should have been delivered to Christopher on 17 September 2008. The building was, however, only completed on 20 April 2010 as certified by

BODCO's architect. In late April 2010, BODCO issued notice to Christopher to take vacant possession and he was deemed to have done so on 5 May 2010. The certificate of fitness for occupation was only issued by SMC on 19 October 2012. Christopher filed a claim with the second respondent ('the Tribunal') claiming LAD for late delivery of vacant possession from the completion date under the SPA until the date vacant possession was delivered to him. The Tribunal, however, granted Christopher LAD calculated from the completion date until the date the certificate of fitness for occupation was issued by SMC in reliance upon cl 17(3). BODCO filed the instant application for judicial review to quash the Tribunal's decision contending it was unreasonable and wrong in law, inter alia, on the ground the decision was based on a ground not pleaded or advanced by Christopher. BODCO sought a declaration that the LAD should only have been computed from the expiry of the completion date under the SPA until the date of delivery of vacant possession and not until the date of issuance of the occupation permit by SMC.

Held, allowing the application:

(1) The completion date of the building was the date of the certificate of practical completion ('CPC') and not the date of the occupation permit. The only contractual document that clearly certified the completion of the building was none other than the CPC. Clause 19(1) of the SPA clearly stated that the event of the 'completion' of the building was the issuance of the architect's CPC certifying that the building had been duly completed. The deeming provision of cl 17(3) had to be read subject to cl 19(1) and not in isolation. The definition of 'completion' must therefore be drawn from cl 19(1), rebutting presumption of the deeming provision of cl 17(3) of the SPA. The only person qualified to certify the completion of the building was the architect and not the Sibu Municipal Council (see paras 30 & 34).

(2) Perusing the SPA as a whole, especially cl 17 and, in particular, cll 17(1) and (2), the applicant was only obliged to (a) complete the building and (b) to hand over vacant possession (cl 19(2) of the SPA) by issuing a notice to the first respondent to take vacant possession within 24 months from the date of the SPA failing which the applicant was to pay the first respondent pre-estimated liquidated damages for late delivery of vacant possession at the agreed rates from the 'initial completion date under the contract' until the 'date of completion'. The obligation of the applicant never extended to giving the 'right of occupation' within 24 months (as distinct from the 'right of possession') (see para 34).

(3) The sixth schedule referred to in cl 17(2) of the SPA clearly stated that the 'pre-estimated liquidated damages' payable was for 'payment by the vendor in default of handing over of vacant possession' and not failure to give the 'right of occupation'. Thus the payment of pre-estimated

liquidated damages only extended from the 'initial completion date' under the SPA until the 'date of completion (vacant possession) and not until the date of issuance of the occupation permit (see para 34).

(4) The first respondent's statement of claim claimed for damages for late handing over of vacant possession and not for late handing over of occupation. The second respondent went on a frolic of its own by deciding on a ground not advanced or pleaded by the first respondent by holding that the damages had to be computed until the date of issuance of the occupation permit. The second respondent had thus committed an error of law (see paras 45–46).

[Bahasa Malaysia summary

Responden pertama ('Christopher') telah memasuki perjanjian jual beli ('PJB') dengan pemohon ('BODCO') untuk membeli bangunan yang dibina olehnya. Di bawah fasal 17(1) PJB itu, BODCO telah membuat kontrak untuk menyerahkan milikan kosong hartanah itu kepada Christopher dalam tempoh 24 bulan dari tarikh PJB itu dan jika gagal, di bawah fasal 17(2), ia bersetuju untuk membayar Christopher anggaran ganti rugi jumlah tertentu ('GRJT') dikira sehingga tarikh siap bangunan. Fasal 19(1) PJB memperuntukkan agar arkitek BODCO mengesahkan bila pembinaan bangunan itu telah siap. Fasal 19(2) membenarkan BODCO mengeluarkan notis kepada pembeli untuk mengambil milikan kosong bangunan itu dan memperuntukkan agar pembeli hendaklah dianggap telah mengambil milikan kosong 14 hari selepas notis tersebut dikeluarkan. Fasal bermasalah dalam PJB itu adalah fasal 17(3) yang menyatakan bahawa bangunan itu telah dianggap siap apabila sijil yang dinyatakan dalam fasal 20 telah dikeluarkan Sijil ini merujuk kepada sijil kelayakan menduduki yang dikeluarkan oleh pihak berkuasa tempatan, dalam kes ini, Majlis Perbandaran Sibu ('MPS'). Melihat kepada jangka masa 24 bulan yang ditetapkan dalam fasal 17(1) PJB, milikan kosong bangunan itu sepatutnya diserahkan kepada Christopher pada 17 September 2008. Bangunan ini, bagaimanapun, hanya siap pada 20 April 2010 seperti yang disahkan oleh arkitek BODCO. Lewat April 2010, BODCO telah mengeluarkan notis kepada Christopher untuk mengambil milikan kosong dan dia dianggap telah berbuat demikian pada 5 Mei 2010. Sijil kelayakan menduduki itu hanya dikeluarkan oleh MPS pada 19 Oktober 2012. Christopher telah memfailkan tuntutan bersama responden kedua ('Tribunal itu') dengan menuntut GRJT untuk serahan lewat miikan kosong dari tarikh siap di bawah PJB itu sehingga tarikh milikan kosong itu diserahkan kepadanya. Tribunal itu, bagaimanapun, telah memberikan Christopher GRJT yang dikira dari tarikh siap sehingga tarikh sijil kelayakan menduduki untuk dikuduki telah dikeluarkan oleh PS dengan bergantung kepada fasal 17(3). BODCO telah memfailkan permohonan ini untuk semakan kehakiman bagi membatalkan keputusan Tribunal dengan berhujah ia tidak munasabah dan salah di sisi undang-undang, antara lain, atas alasan keputusan

itu berdasarkan alasan yang tidak dipli atau dikemukakan oleh Christopher. BODCO memohon deklarasi bahawa GRJT hanya patut dikira dari tamat tarikh siap di bawah PJB sehingga tarikh serahan milikan kosong dan bukan sehingga tarikh keluaran permit untuk menduduki oleh MPS.

Diputuskan, membenarkan permohonan:

(1) Tarikh siap bangunan itu adalah tarikh sijil akuan siap ('SAS') dan bukan tarikh permit untuk menduduki itu. Satu-satunya dokumen kontraktual yang jelas mengesahkan bangunan itu siap tidak lain daripada SAS. Fasal 19(1) PJB jelas menyatakan bahawa kejadian 'completion' bangunan itu adalah keluaran SAS arkitek yang mengesahkan bahawa bangunan itu telahpun siap. Peruntukan fasal 17(3) perlu dibaca tertakluk kepada fasal 19(1) dan bukan secara berasingan. Tafsir 'completion' dengan itu hendaklah dibuat daripada fasal 19(1), dengan mematahkan andaian peruntukan fasal 17(3) PJB. Satu-satunya orang yang layak untuk mengesahkan bangunan itu siap adalah arkitek dan bukan MPS (lihat perenggan 30 & 34).

(2) Setelah meneliti PJB secara keseluruhan, terutamanya fasal 17 dan, khususnya, fasal-fasal 17(1) dan (2), pemohon hanya bertanggungjawab untuk (a) menyiapkan bangunan itu dan (b) menyerahkan milikan kosong (fasal 19(2) PJB) dengan mengeluarkan notis kepada responden pertama untuk mengambil milikan kosong dalam tempoh 24 bulan dari tarikh PJB itu dan jika gagal pemohon hendaklah membayar responden pertama ganti rugi jumlah tertentu yang telah dianggarkan terlebih dahulu untuk serahan lewat milikan kosong itu pada kadar yang dipersetujui dari 'initial completion date under the contract' sehingga 'date of completion'. Tanggungjawab pemohon tidak pernah melangkaui sehingga memberikan 'right of occupation' dalam tempoh 24 bulan (berbeza daripada 'right of possession') (lihat perenggan 34).

(3) Jadual keenam yang dirujuk dalam fasal 17(2) PJB itu jelas menyatakan bahawa 'pre-estimated liquidated damages' yang perlu dibayar untuk 'payment oleh penjual jika gagal menyerahkan milikan kosong' dan bukan kegagalan memberikan 'right of occupation'. Oleh itu bayaran untuk ganti rugi jumlah tertentu yang telah dianggarkan terlebih dahulu hanya melangkaui dari 'initial completion date' di bawah PJB itu sehingga 'date of completion' (milikan kosong) dan bukan sehingga tarikh keluaran permit untuk menduduki (lihat perenggan 34).

(4) Penyataan tuntutan responden pertama menuntut ganti rugi untuk serahan lewat milikan kosong itu dan bukan untuk serahan untuk menduduki. Responden kedua bertindak membuat andaian dengan sendiri apabila memutuskan atas alasan yang tidak dikemukakan atau dipli oleh responden pertama dengan memutuskan bahawa ganti rugi perlu dikira sehingga tarikh keluaran permit untuk menduduki itu.

A Responden kedua dengan itu telah melakukan kesilapan undang-undang (lihat perenggan 45–46).]

Notes

B For cases on liquidated damages, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6814–6815.

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228; [1990] 1 CLJ (Rep) 33, SC (refd)

C *Gallant Acres Sdn Bhd v Kepong Development Sdn Bhd* [2004] MLJU 398, HC (refd)

Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad [2004] 5 MLJ 495, HC (refd)

D *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174; [2012] 1 LNS 755, CA (refd)

Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors [2011] 5 MLJ 913, CA (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

E *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 3 CLJ 310, FC (refd)

South East Asia Bricksworks Sdn Bhd v Maria Antonette [1979] 1 MLJ 46 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (refd)

F *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai* [1988] 3 MLJ 221, HC (refd)

Legislation referred to

G Housing Developers (Control and Licensing) Regulations 1988

Housing Developers (Tribunal for Housing Purchaser Claims) Regulations 2010 s 17A

Rules of Court 2012 O 53 rr 3(2), 3(1)

Goh Swee Hua (Tang & Partners Advocates & Solicitors) in Originating Summons
H *Nos SBW-13–1/2 of 2014, SBW-13–2/2 of 2014,SBW-13–3/2 of 2014, SBW-13–4/2 of 2014 for the applicant.*

Wee Wui Kiat (Battenberg & Talma Advocates) in Originating Summons No SBW-13–1/2 of 2014 for the first respondent.

Augustine Liom (Tang & Co) in Originating Summons No SBW-13–2/2 of 2014
I *for the first respondent.*

First respondent absent in Originating Summons No SBW-13–3/2 of 2014.

Augustine Liom (Tang & Co) in Originating Summons No SBW-13–4/2 of 2014 for the first respondent.

Mohd Adzrul bin Adzlan (State Attorney General's Chambers) in Originating

Summons Nos SBW-13–1/2 of 2014, SBW-13–2/2 of 2014,SBW-13–3/2 of 2014, SBW-13–4/2 of 2014 for the second respondent.

Lee Heng Cheong J:

INTRODUCTION

[1] This is the applicant's submission in respect of its application under O 53 r 3(1) of the Rules of Court 2012 for judicial review for an order of certiorari to quash the decision of the Tribunal, namely, the Tribunal for Housing Purchaser Claims ('the Tribunal') vide Claim No TTPRS/0016/13.

[2] The applicant, on 15 July 2014 was granted leave to commence proceedings under O 53 of the Rules of Court 2012 for the following reliefs:

(a) an order of certiorari to remove into the High Court of Sabah and Sarawak in Sibu to quash the award of the tribunal for housing purchaser claims delivered on 14 November 2013 vide Case No TTPRS/OO14/13, by which the Tribunal held that the computation of liquidated damages accrues from the expiry of the completion period vide Form G sale and purchase contract (vide the Schedule in the Housing Developers (Control and Licensing) Regulations 1988) to the date of the issuance of the occupation permit by the present local authority, namely, the Sibu Municipal Council;

(b) a declaration that the computation of liquidated damages vide cl 17(2) of the Form G sale and purchase contract (vide the Schedule G in the Housing Developers (Control and Licensing) Regulations 1988) commences from the expiry of the completion period (24 months) vide the Form G sale and purchase contract to the date of date of delivery of vacant possession of the subject matter of the contract;

(c) an order that the applicant do pay a sum of RM6,300 being liquidated damages for late completion and delivery of vacant possession of 21 months computed from the expiry of the completion period (24 months) (15 August 2008) vide the Form G sale and purchase contract to the date of delivery of vacant possession of the subject matter of the contract;

[3] The applicant filed in the statement pursuant to O 53 r 3(2) of the Rules of Court 2012 which consists of affidavit in support of Leonard Ulrick Chai Ko Yong, affirmed on 11 February 2014 and the supplementary affidavit in support of Leonard Ulrick Chai Ko Yong, affirmed on 2 July 2014.

[4] Leave to commence proceedings under O 53 of the Rules of Court 2012 was granted on 15 July 2014 and the requisite order was served on the State Attorney General's Chambers on 24 July 2014.

GROUNDS OF RELIEF SOUGHTS

[5] There are two (2) main grounds upon which the applicant is seeking relief before this court, are as follows:

(a) that the second respondent had committed errors of law, and/or acted unlawfully by basing its decisions on irrelevant facts and omitting the relevant facts; and

(b) that the decision by the second respondent was unreasonable, and that no reasonable court in similarly circumstanced would have concluded, on the facts available, that there was a delay of 50 months for the applicant to complete the said building.

(see para 3 at of the statutory statement of the applicant).

BACKGROUND

[6] The first respondent was the purchaser of a property described as Sublot No 506 Block 11 Seduan Land District ('Sublot 506') together with a completed building thereon ('the said building') from the applicant, vendor, being a licensed housing developer under the Housing Developers (Control and Licensing) Ordinance 1993 ('the HDO').

[7] The applicant and the first respondent entered into a sale and purchase agreement ('the SPA') dated 18 September 2006 (exh LC5) and supplementary agreement dated 25 September 2006 (exh LC6) for the purchase of Sublot 506.

[8] The second respondent is established pursuant to s 17A of the HDO and s 24 of the Housing Developers (Tribunal for Housing Purchaser Claims) Regulations 2010 was enacted to regulate the operations of the tribunal.

[9] Pursuant to cl 17(1) of the SPA, the applicant undertook to complete the construction of the said building on Sublot 506 and to deliver vacant possession of the same to the purchaser, the first respondent within 24 months from the date of the SPA ie 18 September 2006 which translate to 17 September 2008 ('the completion date').

[10] The said building on Sublot 506 was only completed on 20 April 2010 as stated in the certificate of practical completion (CPC) by DK Architect (see exh LC7).

[11] Pursuant to cl 19 (1) of the SPA, the applicant then delivered vacant possession of Sublot 506 to the first respondent in the manner prescribed in cl

19(2) of the SPA vide its letter dated 21 April 2010 (see exh LC8, the notice to take vacant possession).

[12] Clause 19(2) of the SPA states that 14 days thereafter, whether or not the purchaser has actually entered into possession or occupation of the said property, the purchaser shall be deemed to have taken delivery of vacant possession and the vendor thereafter shall not be liable for any loss or damage to the said property and/or to the fixtures and fittings therein.

[13] The applicant then applied for the issuance of occupation permit on 14 September 2010 from the Sibu Municipal Council (SMC) (see exhs LC9 and LC10). The occupation permit was only issued by SMC on 19 October 2012.

[14] It is undisputed that the applicant was late in the delivery of vacant possession of Sublot 506 to the first respondent. As a consequence, the first respondent then filed his claim to the second respondent on 2 October 2013, claiming for damages for the late delivery of vacant possession that is a claim for liquidated agreed damages (LAD) at the rate of RM300 per month (pro-rateable daily) from the completion date to the date of delivery of vacant possession of Sublot 506.

[15] At the hearing before the second respondent, the second respondent computed the LAD from the completion date (ie 17 September 2008) to the date of issuance of occupation permit (ie 19 October 2012).

[16] The applicant contends that the second respondent's computation of the LAD has affected the applicant, adversely as follows:

The second respondent's Computation:

(17 September 2008 to 19 October 2012)

49 months x RM300 = RM14,700

The applicant's Computation:

(17 September 2008 to 5th May 2010 – the date of the first respondent deemed to have taken possession under cl 19(2) of the SPA)

20 months x RM300 = RM6,000

[17] Being dissatisfied with the second respondent's award, the applicant now filed this application under O 53 of the Rules of Court 2012 to review and quash the said award of the second respondent.

A THE FIRST AND SECOND RESPONDENTS' CONTENTION

[18] The second respondent contends that the above issue raised by the applicant herein has already been dealt with by the Sibu High Court in the case of *BODCO Engineering and Construction Sdn Bhd v Tribunal For Housing Purchaser Claims & Ors* (vide Application for Judicial Review No SBW-13JR-4/8 of 2013), where by Her Ladyship YA Supang Lian held, inter alia, as follows:

> To my mind, the meaning to be attributed to the words 'date of completion' in sub-cl (2) is governed by sub-cl (3). Sub-cl (3) reads: 'For the purpose of this Clause, the Building is deemed to be completed when the Certificate stipulated in cl 20 below has been issued'. It is to be noted that sub-cl (3) begins with the phrase 'For the purpose of this Clause'. Giving the words 'for the purpose of this clause' their plain meaning, sub-cl (3) is meant to apply specifically to cl 17. By sub-cl (3) it is provided that the building is deemed to be completed when the occupation permit as stipulated in cl20 has been issued. By extension therefore, the 'date of completion' in sub-cl (2) means the date when the occupation permit as stipulated in cl 20 has been issued. Hence, in my view, the Tribunal had not erred in computing LAD from the initial completion date (14 August 2008) to the date of issuance of the occupation permit on 14 November 2012.

[19] Further the second respondent contends that the applicant's delay in delivering vacant possession of Sublot No 506 to the first respondent, triggered the operation of s 17(2) of the SPA. Her Ladyship Puan Supang Lian J in the above case (vide Application for Judicial Review No SBW-13JR-4/8 of 2013) further stated that:

> As we have seen, the applicant failed to deliver vacant possession within the stipulated time. It is for such eventuality that sub-cl (2) comes into play.

[20] The second respondent further contends that it is trite that courts do not act as an appeal court in cases of judicial review. judicial review is concerned not with merits of a decision but with the manner in which the decision is made. Judicial review is entirely different from an ordinary appeal.

H RELEVANT LAWS AND PRINCIPLES

[21] In *Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495, the court held, inter alia, as follows:

> Certiorari is the most commonly invoked writ in modern Administrative Law. It is the principal means of invoking judicial review over Tribunals and quasi-judicial bodies which are now proliferating outside the regular judicial system ... In Malaysia, certiorari has been frequently invoked to quash the discretionary decisions of Ministers and other administrative authorities. Certiorari has thus emerged into a general remedy for the control of decisions by the administration

affecting rights of persons. Certiorari occupies a fundamental place in the entire scheme of judicial review of administrative action.

[22] In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, the court, inter alia, held as follows:

Parliament has attempted to exclude judicial review of the decisions of the court by providing in s 33B (1) of the Act that an award, decision or order of the court under the Act shall be final and conclusive. However, *an inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not.* Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunised from judicial review by an ouster clause however widely drafted.

(Emphasis added.)

[23] The Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*, further held, inter alia, as follows:

Jurisdiction is exceeded when error of law is committed, an unfair procedure is adopted, or where the decision reached is unreasonable; However, it is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed.

(Emphasis added.)

...

In my judgment the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: *a misdirection in law in making the decision therefore rendered the decision ultra vires*. Professor Wade considers that the true effect of the Anisminic case is still in doubt: see Wade at p 299ff. But in my judgment the decision of this House in *O'Reilly v Mackman* [1983] 2 AC 237; 1982] 3 All ER 1124, establishes the law in the sense that I have stated. Lord Diplock, with whose speech all the other members of the committee agreed, said that the decision in the Anisminic case: 'has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that Anisminic made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being 'a determination' within the meaning of the

empowering legislation, was accordingly a nullity (see [1983] 2 AC 237 at p 278; [1982] 3 All ER 1124 at p 1129.)

> *Therefore, I agree with Mr Burke that in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law.* (Emphasis added.)

[24] In *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288, the Federal Court held, inter alia, as follows:

> The views expressed by the majority in *R Rama Chandran v The Industrial Court of Malaysia* that, in judicial review proceedings, the courts had the powers to: *(a) review the decision of a tribunal on the merits; (b) substitute a different decision in place of the tribunal's decision without remitting it to the tribunal for re-adjudication; and (c) order consequential relief* were not the product of 'judicial excessivism'. On the contrary, they reflected the kind of controlled judicial activism that was needed in order to meet, in a supervisory context, the ever-widening powers conferred upon statutory tribunals or other bodies which had proliferated in modern times (see paras 9, 12); *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 followed.
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> (Emphasis added.)

[25] In the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, the Federal Court held, inter alia, as follows:

> Held (10) (Per Edgar Joseph Jr FCJ) *A decision susceptible to judicial review is not only open to challenge on the ground of procedural impropriety but also on the grounds of illegality and irrationality; and in practice, this permits the Court to scrutinise such decisions not only for process but also for substance (see p 187B). The Court must, therefore, do what the Industrial Court should have done*.
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> ...
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> (15) (Per Edgar Joseph Jr FCJ) It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent power and its extent may be determined not merely by judicial development but also by legislative intervention (see p 191C-D); *R v Cashiobury Hundred Justices* (1823) 3 Dow & Ry 35 followed.
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> (Emphasis added.)

[26] In *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 1 CLJ (Rep) 33, the Supreme Court held, inter alia, as follows:

> [1] In making the said award the Industrial Court did not take into account matters it ought to have taken into account and instead took into account matters it should

not have taken into account and thereby had exceeded its jurisdiction and acted without jurisdiction.

CONSIDERATION OF THE APPLICATION

PERTINENT ISSUES

[27] This court finds that the sole issue to determine is whether the computation of the pre-estimated liquidated damages (LAD) payable by the applicant to the first respondent in the event that the applicant failed to deliver vacant possession of the said house within 24 months from the date of the SPA until the date of the issuance of the occupation permit or until the date of delivery of vacant possession.

[28] The second respondent held that the liquidated agreed damages payable by the applicant shall be calculated from the initial completion date until the date of the issuance of the occupation permit whereas the applicant's computation of the LAD is from the initial completion date until the date of delivery of vacant possession.

[29] The specific findings of the second respondent which is the subject of this review application (see exh LC15 of the supplementary affidavit in suppor) is reproduced as follows.

> The Tribunal found that cl17(3) of the SPA clearly states that the building *is deemed to be completed when the Certificate stipulated in cl20 has been issued*. Hence, the President interpreted that the Property was completed when the council issued the Occupation Permit. (Para 1 under 'TRIBUNAL FINDING')
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> (Emphasis added.)

CHRONOLOGY OF EVENTS

[30] The chronology of the pertinent events is as follows:

Chronological Events	Date
Sale and purchase agreement (SPA)	16 August 2006
Original date of completion (cl 17(1) – 24 months)	15 August 2008
Issuance of certificate of practical completion (cl 19(1)) by architect	20 April 2010
Notice to take vacant possession (cl19(2))	21 April 2010
First respondent deemed to have taken vacant possession (cl 19(2) – expiry of 14 days from the notice)	05 May 2010
Application to the council for the issuance of occupation permit (cl 19(1))	14 September 2010

Council disapproved the applicant's application for issuance of occupation permit	09 May 2011
Occupation permit issued by council	19 October 2012

[31] This court notes that the decision of Her Ladyship Puan Supang Lian J on 11 April 2014 in the said Application for Judicial Review No SBW-13JR-4/8 of 2013 involving the same applicant, BODCO Engineering and Construction Sdn Bhd, same issues and similar facts like the present case and that Her Ladyship has already ruled on the interpretation of the material points in particular that the meaning of the 'date of completion' is the date that the occupation permit is issued by the Local Authority Council.

[32] With respect, this court however does not share the same view and reasoning of the honourable judge in the said Application for Judicial Review No SBW-13JR-4/8 of 2013 for the following reasons.

[33] The followings are the pertinent clauses of the SPA:

(a) cl 17(1) of the SPA states as follows:

> Subject to cl18 herein below and provided that the Purchaser duly pays the instalments ... the said Building shall be handed over to the Purchaser within twenty-four (24) months from the date of this Agreement.

(b) cl 17(2) of the SPA states as follows:

> If the Vendor fails to hand over vacant possession of the said Building within the period stipulated in subcl(1), the Vendor shall pay to the Purchaser monthly such sums as specified in the Sixth Schedule herein as the pre-estimated liquidated damages until the date of completion of the said Building and if the said Building is completed on any day before the end of the month then the liquidated damages shall be calculated pro rata for that particular month.

(c) cl 17(3) of the SPA states as follows:

> For the purpose of this clause, the Building is deemed to be completed when the Certificate stipulated in cl20 has been issued.

(d) cl 19(1) of the SPA states as follows:

> Upon issuance of a Certificate by the Vendor's Architect certifying that the construction of the said Building has been duly completed ...

(e) cl 20 of the SPA states as follows:

> The Vendor shall, pursuant to the application for the Certificate of Fitness for Occupation at its own cost and expense, duly comply with all the requirements of the Appropriate Authorities which are necessary for the

issuance of the Certificate of Fitness for Occupation in respect of the said Building.

[34] This court finds that the date of completion of the said building is the date of the issuance of the certificate of practical completion ('CPC') for the following reasons:

(a) cl 19(1) of the SPA clearly stipulates that 'Upon the issuance of a certificate (CPC) by thearchitect certifying that the construction of the said Building has been DULY completed ...' ; and

(b) pursuant to cl 19(1) of the SPA, the only person qualified to certify the completion of the building is the Architect and not the Council and the said Architect has stated in the CPC as follows;

> We hereby certify that the above project has been completed according to the approved building plans, and has achieved Practical Completion (exh LC7)

(c) the application for the issuance of occupation permit (Form F) further confirmed that the architect is the only person qualified to certify the completion of the Building;

[d] 'I hereby give notice that after the building/s.... has/have been completed in accordance with the Approved Building/structural plan ...';

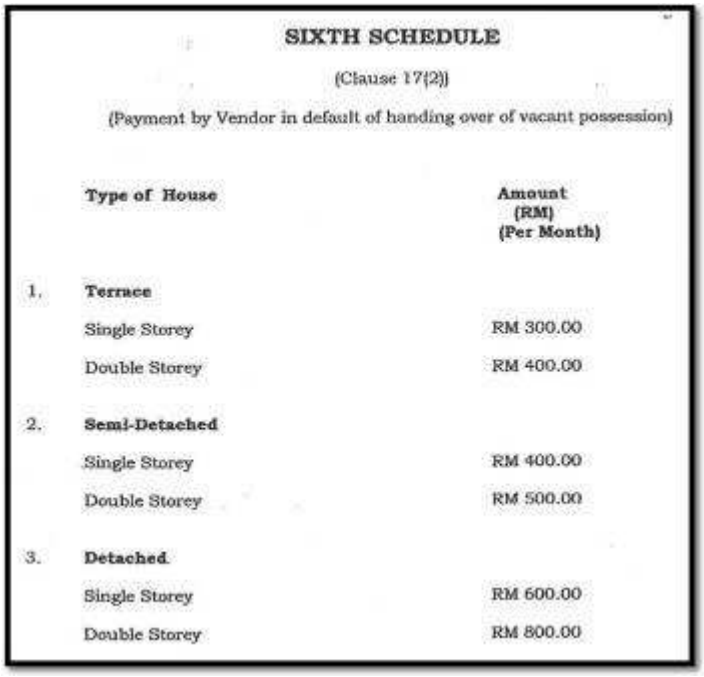
[e] 'I/We hereby certify that supervision of the erection and completion of the buildings ....'

(a) cl 19(2) of the SPA stipulates that the applicant shall hand over vacant possession to the purchaser by requesting the purchaser to take possession of the building (see exh LC8, a notice to take vacant possession) after the architect certify the completion of the building under cl 19(1).

(b) perusing the SPA as a whole, especially the said cl 17 of the SPA in particular, sub-cll 17(1) and 17(2), the applicant is only under an obligation to (1) complete the building and to (2) hand over vacant possession (cl 19(2) the SPA, by issuing a notice to take vacant possession (exh LC8) of the said building to the first respondent within 24 months from the date of the SPA, failing which, the applicant is to pay to the first respondent, pre-estimated liquidated damages for late delivery of vacant possession at the agreed rates from the 'initial completion date under the contract' until the 'date of completion'. Thus this court finds it is clear that the obligation of the applicant never extends to giving the 'right of occupation' within 24 months (as distinct from the 'right of possession').

(c) the Sixth Schedule of the SPA which referred to in cl 17(2) of the SPA, clearly states that the 'pre-estimated liquidated damages' payable under the SPA is for 'payment by vendor in default of handing over of vacant

possession' and not failure to give the 'right of occupation'. Thus the payment of pre-estimated liquidated damages only extend from the 'initial completion date' under the SPA until the 'date of completion (vacant possession)' and not until the date of issuance of occupation permit.



SIXTH SCHEDULE

(Clause 17(2))

(Payment by Vendor in default of handing over of vacant possession)

	Type of House	Amount (RM) (Per Month)
1.	**Terrace**	
	Single Storey	RM 300.00
	Double Storey	RM 400.00
2.	**Semi-Detached**	
	Single Storey	RM 400.00
	Double Storey	RM 500.00
3.	**Detached**	
	Single Storey	RM 600.00
	Double Storey	RM 800.00

(d) cl 19(1) of the SPA clearly states that the event of 'completion' of the building, is that of the issuance of the architect's 'certificate of practical completion', certifying that the building has been duly completed. The deeming provision of cl 17(3) must be read subject to the said cl 19(1) and not in isolation. The definition of 'completion' must therefore be drawn from the said cl 19(1), rebutting presumption of the deeming provision of the said cl 17(3) of the SPA.

[35] In *Gallant Acres Sdn Bhd v Kepong Development Sdn Bhd* [2004] MLJU 398, the court, inter alia, held as follows:

> The phrase 'vacant possession' had been expressed by the English Court of Appeal in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 KB 264 to mean *the obligation of the vendor to hand over the property free of any physical impediments which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property.*
>
> (Emphasis added.)

[36] This court finds that the SPA makes a clear distinction between the 'right of possession' and the 'right of occupation' in that what has been promised by the applicant under the Standard Form G contract is that within 24 months, the applicant would complete and to give vacant possession of the said building to the first respondent but not the right of occupation within 24 months. Support can found in the following cases.

[37] In *South East Asia Bricksworks Sdn Bhd v Maria Antonette* [1979] 1 MLJ 406:

> *The respondent's contention that the house must not only be completed in the sense that it was fit for human habitation but must also be equipped with a certificate of fitness for occupation was unreasonable*. The court would refuse to import a further term into the agreement.
>
> Primarily the court is to determine the meaning that may reasonably be assigned to the word used. In doing so the court should construe it within the four corners of the agreement.
>
> In the light of the various stipulations contained in the agreement, I am of the view that it is unreasonable to construe the word in the manner urged upon me by the respondent. *This would amount to importing a further term namely, completion on satisfaction endorsed by the City Architect issuing a certificate of fitness for occupation. To do so would in effect, be importing a term which was not within the contemplation of the parties and would have the effect of frustrating the contract.* Later applied in *Alexander John Shek Kwok Bun v Rich Avenue Sdn Bhd &Anor* [2008] 2 MLJ 481; [2008] 7 CLJ 754, *Glen William Nunis & Ors v Ekabina Sdn Bhd*).
>
> (Emphasis added.)

[38] Further in *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai* [1988] 3 MLJ 221, the court held as follows:

> The certificate of fitness for occupation is not in issue as it is distinct and separate from the issue of vacant possession as provided for under cl 19 of Schedule E.

[39] Also, in *Maxisegar Sdn Bhd v Veronica Lee Ha Ling & Ors* [2011] 5 MLJ 913, the Court of Appeal held, inter alia, as follows:

> The issuance of the COF was not one of the requirements to be fulfilled for the delivery of vacant possession within the meaning of cll 22 and 23 of the SPA.

[40] Thus this court finds that the completion date of the building is the date of certificate of practical completion and not the date of the occupation permit and that the only contractual document that clearly certifies the completion of the building is none other than the certificate of practical completion (CPC). Clause 19(1) of the SPA clearly stipulates that 'Upon the issuance of a certificate (CPC) by the Architect certifying that the construction

of the said Building has been duly completed ....'; and further pursuant to the said cl 19(1), the only person qualified to certify the completion of the said building is the architect and not the council (see exh LC7).

[41] Since the second respondent has committed an error of law, then it had acted in excess of its jurisdiction, because it has no jurisdiction to commit an error of law. Support for this proposition can be found in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*, where the Court of Appeal stated, inter alia, as follows:

> In my judgment, the true principle may be stated as follows. *An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not*. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction.
>
> So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> (Emphasis added.)

UNPLEADED ISSUE

[42] This court agrees with the applicant's contention that the second respondent committed an error of law when it went on the frolics of its own and acted or advanced on an unpleaded issue found in the first respondent's statement of claim.

[43] Support can be found in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 3 CLJ 310 where the Court held as follows:

> **[31]** The Court of Appeal has reproduced the applicant's statement of case in full in its judgment and found that the issue of victimisation was never pleaded. From the statement of case reproduced there is no doubt that the issue of victimisation was never pleaded. It was not a ground advanced by the appellant. As such the Industrial Court cannot act on a ground which was not advanced in a pleaded case. Section 30(5) of the Act cannot rescue the appellant's case.

[44] Further in *Kuan Pek Seng @ Alan Kuan v Robert Doran & 2 Ors* [2010]

6 MLJ 1; [2012] 1 LNS 755, the Court of Appeal stated, inter alia, as folllows: A

> In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2009] 5 MLJ 770; [2010] 8 CLJ 629; [2010] 1 LNS 907, the Court of Appeal held (per Low Hop Bing JCA) that the issue of victimisation was never pleaded and the Industrial Court had gone on a frolic of its own in finding that the employee was victimised, and (per Abdul Malik Ishak JCA) that in the absence of pleadings, evidence cannot be considered by the court. B

[45] It is clear in the respondent's statement of claim claimed for damages for late handing over of vacant possession and not for late handing over of occupation (see exh LC1). C

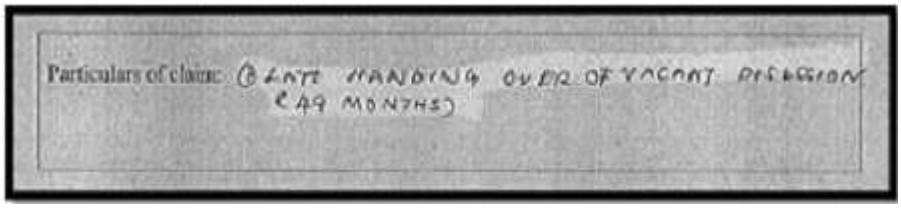


EXHIBIT LC1 D

E

[46] This court finds that the second respondent had gone on a frolic of its own, by deciding on a ground which was not advanced or even pleaded by the first respondent in their statement of claim by holding that the pre-estimated liquidated damages should be computed until the date of issuance of occupation permit. Thus this court finds that the second respondent had committed an error of law. F

ORDER

[47] In the light of this court's above findings, this court thus grants an order in terms of the above applications for judicial review, with no order as to costs. G

Application allowed.

Reported by Ashok Kumar H

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